

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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U.S. COURT OF APPEALS
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KEVIN COOPER,

Appellant,

v.

RICHARD A. RIMMER, Acting Di-
rector of the California Department of
Corrections, and JEANNE WOOD-
FORD, Warden, San Quentin State
Prison, San Quentin, California,

Appellees.

Case No. 04-99001

DEATH PENALTY CASE

EXECUTION IMMINENT:

Execution Date February 10, 2004

EMERGENCY MOTION TO STAY

EXECUTION DATE SET FEBRUARY 10, 2004

EMERGENCY REVIEW REQUESTED

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TO THE HONORABLE JUDGES OF THIS COURT:

In less than four days, appellant and condemned inmate Kevin Cooper is scheduled to be executed by means of lethal injection. Mr. Cooper's underlying complaint alleges a violation of 42 U.S.C. Section 1983, challenging the constitutionality of the lethal injection procedure as it is currently administered in California. By this motion, Mr. Cooper asks that the Court issue a stay of execution, until such time as this appeal may be fully and adequately considered on the merits.

The lethal injection procedure currently in place in California, adopted without medical review, raises serious questions about the humaneness of this execution method as it is presently administered. California's protocol lacks procedural safeguards to ensure proper implementation of the lethal injection process. It was designed on an ad hoc basis and incorporates aspects, such as the use of an unnecessary muscle relaxant, common to similarly flawed lethal injection procedures in other jurisdictions. Specifically, new evidence indicates that the procedure increases the risk that a condemned inmate will suffer unnecessary and excruciating pain during what is misleadingly perceived to be a calm and serene execution. In light of this evidence, challenges to the procedure have been initiated in recent months across the country, and Mr. Cooper now brings this challenge in the Ninth Circuit.

I. FACTUAL BACKGROUND

In 1985, Mr. Cooper was convicted of multiple homicide and sentenced to death. On December 17, 2003, the Superior Court of San Diego issued a death warrant scheduling Mr. Cooper's execution for February 10, 2004. Mr. Cooper has not elected a method of execution. Thus, by the laws of the State of California, he will be killed by means of lethal injection.

On February 1, 2004, Mr. Cooper filed a complaint in the United States District Court for the Northern District challenging the lethal injection procedure in California. Mr. Cooper's complaint requests injunctive relief enjoining defendants from executing him by means of lethal injection, under the method and the procedures currently in effect in the State of California.

On February 5, 2004, the parties appeared before the District Court to argue a Motion for Temporary Restraining Order. On February 6, 2004, the District Court issued its order denying Mr. Cooper's request.

The Court based its order upon the following procedural reasons:

1. Failure to bring the complaint in a timely manner, as required under Gomez; and
2. Failure to establish likelihood of success on the merits or the existence of serious questions going to the merits.

Mr. Cooper is scheduled to be executed in less than four days. Defendant-

appellees ("Defendants") intend to administer a lethal injection containing pancuronium bromide, a neuromuscular blocking agent. Mr. Cooper has presented evidence that the chemicals California intends to use are now widely considered unfit for euthanizing animals. To date, no court has considered the merits of Mr. Cooper's claims. Therefore, Mr. Cooper brings this appeal challenging the District Court's denial of the temporary restraining order. In conjunction with his appeal, Mr. Cooper asks that the Court issue a stay of execution, so that Mr. Cooper may survive at least long enough to litigate this appeal and his underlying claim.

Mr. Cooper files this Emergency Motion for Stay in the Circuit Court because it would be impracticable, in light of the basis cited by the District Court for denying Mr. Cooper's request for a temporary restraining order, and the extremely short time frame for obtaining relief, for Mr. Cooper to file a request for a stay in the District Court in the first instance.

II. ARGUMENT

A. The District Court's Order Is Properly Reviewed On Appeal

The Court's denial of Mr. Cooper's motion for a temporary restraining order in this situation is tantamount to a denial of a preliminary injunction and is thus appealable. *Environmental Defense Fund, Inc. v. Andrus*, 625 F.2d 861 (9th Cir. 1980). By denying the temporary restraining order, the District Court

has effectively foreclosed Mr. Cooper's ability to litigate his constitutional challenge because Mr. Cooper will be executed before he can fully address his claim on the merits. Without the ability to appeal the decision, Mr. Cooper is left without a remedy for his causes of action. Similarly, without the issuance of a stay pending resolution of the temporary restraining order issue, Mr. Cooper will not have the necessary time.

B. The Court's Order Meets the Standard for a Stay of Execution

This Court evaluates applications for stays pending appeal under the same standards employed by district courts in evaluating motions for preliminary injunctive relief. See *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir.), rev'd in part on other grounds, 463 U.S. 1328, 104 S. Ct. 10, 77 L. Ed. 2d 1431 (1983). Mr. Cooper must show either a probability of success on the merits and the possibility of irreparable injury, or that serious legal questions are raised and the balance of hardships tips sharply in petitioner's favor. See *Artukovic v. Rison*, 784 F.2d 1354, 1355 (9th Cir. 1986); see also *Arthurs v. INS*, 959 F.2d 142, 143-44 (9th Cir. 1992). These standards represent the outer extremes of a continuum, with the relative hardships to the parties providing the critical element in determining at what point on the continuum a stay pending review is justified. See *Lopez*, 713 F.2d at 1435; *Abbassi v. INS*, 143 F.3d 513, 514 (9th Cir. 1998).

Mr. Cooper's underlying claim sets out the great extent to which Califor-

nia's lethal injection procedure is riddled with uncertainty and risk of error. Mr. Cooper's medical experts raise serious questions with respect to one of the drugs used in the procedure, pancuronium bromide. And, respondent does not dispute plaintiff's contentions, supported by uncontroverted expert declarations, that California's procedures have resulted in botched executions, and are likely to do so in the future. The Warden's own medical experts differ in opinion, and the expert declarations, to the extent they controvert each other, emphasize the need to fully address this very important and previously misunderstood area of science, before another condemned prisoner is executed by lethal injection.

Mr. Cooper is able to establish a likelihood of success on the merits of his claim and a balancing of the hardships that weighs considerably in his favor. Thus, he is able to satisfy prongs one and two of the test applied to applications for stays pending appeal of a district court's denial of a preliminary injunction.

Most importantly, in a death penalty case with execution imminent, it is certain that irreparable harm will result if the execution is not stayed pending Mr. Cooper's appeal and a determination of his claims on the merit.

C. **The Issuance of a Stay Would Not Prejudice the Defendants**

Whether a stay should issue depends in part on the balancing of the equities in the situation. In the case of an execution, the hardships far outweigh the desire the Defendants may have to enforce the judgment. In issuing the stay,

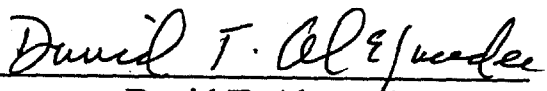
this Court would ensure that there is enough time to review and evaluate the issues and make an informed and reasoned decision. In the event the Defendants prevail in the appeal, the State is free to re-set the execution date, suffering no detriment of their own.

III. CONCLUSION

There is no disputing the irreparable harm that will be suffered by Mr. Cooper should the execution not be stayed. Mr. Cooper's Section 1983 complaint raises a constitutional challenge that presents substantial grounds upon which relief might be granted. A stay of execution would permit a full and fair review of the issues. For this reason, and the reasons stated above, Mr. Cooper respectfully requests that this Court stay his execution date and permit an orderly disposition of his appeal.

Dated: February 7, 2004.

Respectfully submitted,


David T. Alexander
Counsel of Record for Appellant Kevin
Cooper

DECLARATION OF SERVICE

I am over the age of eighteen years old and not a party to the above-entitled action. My place of employment and business address is Orrick, Herrington & Sutcliffe LLP, Old Federal Reserve Bank Building, 400 Sansome Street, San Francisco, California 94111.

On February 7, 2004, I served a copy of the Emergency Motion to Stay by placing a true copy thereof enclosed in a sealed envelope designated by Federal Express with delivery fees provided for and delivering it to a Federal Express office in San Francisco, California authorized to receive documents, addressed to the following at their respective office addresses last given, as follows:

BILL LOCKYER, ESQ.
Attorney General of the State of California
HOLLY D. WILKENS, ESQ.
Deputy Attorney General
110 West A Street, Suite 1100
San Diego, California 92101

MR. FREDERICK K. OHLRICH
Court Administrator and
Clerk of the Supreme Court
Supreme Court of California
Earl Warren Building
350 McAllister Street
San Francisco, California 94102

and causing it to be personally delivered to:

KEVIN COOPER
C-65304-3-EB-82
San Quentin Prison
San Quentin, California 94974
CONFIDENTIAL LEGAL MAIL

I declare under penalty of perjury under the laws of the

State of California that the foregoing is true and correct and that this document was executed on February 7, 2004 at San Francisco, California.



Anne Hawkins